No. 20481

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CARROLL-NASLUND DISPOSAL, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on May 25, 1965, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*)[1] The Board's de-

[1] The relevant statutory provisions are reprinted *infra* pp. 21-24.

cision and order (R. 38-44)[2] are reported at 152 NLRB No. 88. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Lewiston, Idaho.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent is engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction in this case. The Board further found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union[3] as exclusive representative of its employees, by soliciting signatures to letters revoking union authorization cards and by granting unilateral wage increases at a time when it was obliged to bargain with the Union regarding wages and other conditions of employment.

A. *The nature of respondent's business*

Respondent, an Idaho corporation, has its office and place of business in the City of Lewiston, Idaho,

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[2] References designated "R." are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the Record. References designated "GCX" or "RX" are to exhibits of the General Counsel and respondent, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Truck Drivers Local No. 551, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent.

where it is engaged in the collection and disposal of garbage and refuse (R. 39, 19). Respondent performs its services in Lewiston, Idaho and Clarkton, Washington, which are on opposite shores of the Snake River (R. 19-20).[4]

During 1963, respondent's gross income was approximately $88,000 (R. 39; Tr. 157-161). Under local ordinance, the collection of all garbage and rubbish within the City of Lewiston must be under the city's direction, but the mayor and city council are authorized to contract out this service to a private party. Such a contract was entered into between respondent and the city in 1955 and has continued in force until the present (R. 20; RX 1A). During the year 1963, total rubbish fees collected from residents of Lewiston amounted to approximately $45,000 (R. 20, note 3; Tr. 157-161).[5] In addition to this amount collected from Lewiston residents, in the same year respondent received about $23,000 from commercial accounts in Lewiston. Of this amount, about $7,200 was received from employers engaged in interstate commerce and who, in addition, are covered by the Board's jurisdictional standards by reason of having made purchases of $50,000 annually from out-of-

[4] The population of Lewiston in 1960 was 12,691; it is estimated to have about 20,000 inhabitants currently. Lewiston is located on the east bank of the Snake River which is the western boundary of Idaho and the eastern boundary of Washington (R. 19-20).

[5] Under the terms of respondent's contract with the City of Lewiston, the latter bills and collects rubbish collection fees from the residents, retaining 20 percent of the gross collections as compensation for this service.

state sources or having annual gross sales in excess of $500,000 (R. 20-21; Tr. 55-56, 159-160). As part of its agreement with the City of Lewiston, respondent uses and maintains a dump which is city property. The city makes annual purchases directly from outside the state of more than $50,000 (R. 22; Tr. 160-161). Respondent also receives about $11,300 a year from the collection of refuse in Lewiston Orchards Idaho, and approximately $5,200 annually from the operation of a landfill in the Lewiston Orchards Irrigation District, a quasi-municipal corporation (R. 21; Tr. 70-72, 159-160).

Finally, respondent receives about $3,000 a year from the collection of refuse in Clarkston Heights, Washington. For this work in Clarkston Heights respondent uses a truck that operates out of its Lewiston office (R. 21; Tr. 70-71).

B. *The refusal to bargain*

In September 1963, the Union began an organizing drive among respondent's seven employees and obtained signed authorization cards from a majority of them (R. 24; Tr. 78-80). On September 23, the Union wrote respondent as follows (GCX 3):

> This letter will serve to notify you that Truck Drivers Local No. 551 represents the majority of your employees engaged in hauling garbage.
>
> If you so desire, we stand prepared to prove our majority before any disinterested person we may mutually select.
>
> We would like to meet with you to enter into negotiations on behalf of your employees . . . . October 1st, 1963 . . . .

At the request of Hugo Naslund, respondent's co-owner and director of its day-to-day activities, the meeting was postponed a day to October 2, 1963. At this meeting, Byers, the Union's representative, asked Naslund if he recognized the Union as bargaining representative of the employees, and again offered to prove the Union's majority through a card check by an independent third party. Naslund replied that he did not doubt that a majority of the employees had signed cards (R. 24-25; Tr. 82-83; 129-130).

Following a short discussion of various aspects of collective bargaining, Byers stated that he would submit a written contract proposal to respondent within a week (R. 25; Tr. 82-83, 130-131). On October 8, the Union mailed Naslund a proposed collective bargaining agreement and requested a meeting on October 14. Naslund made no reply to this letter, made no counterproposals and did not meet with the Union at any subsequent time (R. 25; Tr. 86-90, 131-134, 142-143).

During this period, Naslund asked employee Pete Schleifer if he had signed a union authorization card. Schleifer replied that he had done so. When Naslund asked him why, the employee answered that he had done so because the other employees had signed cards (R. 25; Tr. 133).

On or about October 29, Naslund had his wife type several identical letters, reading as follows (R. 25; Tr. 138-139, GCX 5):

> This is to notify you that I am satisfied with the working conditions of Carroll-Naslund Disposal

> Service and have no desire to be represented by your union.

Naslund took the letters to five employees at their homes and asked each employee to sign the letter. All five employees signed. Naslund or his wife then mailed the letters separately to the Union (R. 25; 140-142). Around November 1, respondent, without notifying or consulting with the Union, granted wage increases to about half its employees (R. 25; Tr. 134-136).

II. The proceedings before the Board

The charge in these proceedings was filed on November 4, 1963 (R. 3). Following the issuance of a complaint, a hearing was held on March 19 and 20, 1964. At the hearing, testimony was received relating to both the Board's jurisdiction and to the unfair labor practices allegedly committed by the Company. The Trial Examiner's Decision was issued on June 4, 1964. In his Decision, the Examiner concluded that the Board has statutory jurisdiction over respondent (R. 22) but that in his opinion "it would not effectuate the purposes of the Act to assert jurisdiction in the instant case because of the essentially local nature of respondent's operation. Dismissal of the complaint is therefore recommended" (R. 24).

The Examiner then stated (R. 24):

> Although the Examiner has recommended dismissal of the complaint on jurisdictional grounds, we have no way of being certain of the Board's action. The facts of the case are presently in mind and since it is at least possible that the Board might assert jurisdiction, we have decided to make our findings on the merits . . . .

After discussing the evidence summarized *supra*, pp. 4-6, the Examiner found that the Company had violated Section 8(a)(1) and (5) of the Act by failing to meet and bargain with the Union after October 8, by granting unilateral wage increases to a number of its employees, and by undermining the Union by solicitation of signatures from employees to letters withdrawing their union adherence. The Examiner further noted that "the customary remedial action is appropriate," *i.e.*, that respondent should be directed to cease and desist from the unfair labor practices found, to bargain with the Union upon request and to post the usual notices (R. 25-26).

On the day the Trial Examiner's Decision issued, copies thereof were mailed to respondent and its counsel, together with an order transferring the case to the Board. A note on the face of this order of transfer declared that "Exceptions to the Trial Examiner's Decision in this case must be received by the Board in Washington, D. C. on or before June 29, 1964." The note also contained the following statement: "Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto" (R. 27). The excerpts included Sections 102.46 and 102.48 of the Board's Rules and Regulations, which state, in part (R. 29):

> Section 102.46(h) No matter not urged in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.
>
> Section 102.48 . . . (a) In the event no timely or proper exceptions are filed as herein provided,

> the findings, conclusions and recommendations of the Trial Examiner as contained in his decision shall, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes . . . ."

Both the General Counsel and the Union (the charging party herein) duly excepted to the Trial Examiner's determination that the Board should decline to exercise its jurisdiction over respondent (R. 32-37).

Respondent filed no exceptions to the Trial Examiner's Decision, nor did it, upon receipt of the exceptions filed by the General Counsel and the Union, file cross-exceptions, as it was permitted to do by the Board's rules (Section 102.46(e)) (R. 28).

III. The Board's Decision and Order

On the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that respondent is engaged in commerce within the meaning of the Act, and, contrary to the Examiner, found that it would effectuate the purposes of the Act to assert jurisdiction herein (R. 38-40).[6] Since no exceptions

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[6] The differences between the Board and the Trial Examiner on the jurisdictional issue turn on "conclusions, interpretations, law, and policy, . . . open to full review" rather than findings of fact, the "significance" of which "depends largely on the importance of credibility in the particular case." Under these circumstances, the Examiner's initial conclusion regarding jurisdiction, which was reversed by the Board, is not

were filed to the Examiner's findings that respondent had violated Section 8(a)(1) and (5) of the Act by failing to bargain collectively with the Union, by soliciting signatures to letters revoking union authorization cards and by granting unilateral wage increases, the Board adopted these findings *pro forma* (R. 40).

The Board's order (R. 41-43), in accordance with the Examiner's recommendations, requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their protected rights. Affirmatively, the Company is required to bargain collectively with the Union as the representative of its employees and to post the usual notices.

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over Respondent's Operations

A. *The existence of statutory jurisdiction is plain*

Respondent, an Idaho corporation with its principal place of business in Lewiston, Idaho, acknowledged before the Board that it earns over $3,000 per annum through its operations in Clarkston Heights, Washington, and that these operations are carried out by a truck based in Lewiston (*supra*, p. 4). The

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entitled to special weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494, 496. See also, *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686 (C.A. 9); *Utica Observer-Dispatch, Inc.* v. *N.L.R.B.*, 229 F. 2d 575, 577 (C.A. 2).

Board's statutory jurisdiction, therefore, clearly exists.[7] The Act specifically states that the statutory jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce."[8] Moreover, once it is determined, as here, that interstate commerce would be adversely affected if the business immediately involved were disrupted as the result of a labor dispute, the Act applies regardless of the volume of commerce affected, provided it is more than "*de minimus.*" *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607. And see *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 684-685; *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, 371 U.S. 244; *N.L.R.B.* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909. While no mathematical formula is available for determining exactly what is *de minimis*, it is well settled that "*de minimis* in the law has always been taken to mean trifles—matters of a few dollars of less." *N.L.R.B.* v. *Suburban Lumber Co.*, 121 F. 2d 829, 832 (C.A. 3), cert. denied, 314 U.S. 693. Accord: *N.L.R.B.* v. *Stoller*,

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[7] As noted above, although the Examiner recommended that the Board not assert jurisdiction over respondent's operations, he did conclude specifically that the Board had statutory jurisdiction (R. 22). Not having excepted to the factual findings underlying this conclusion respondent is foreclosed from attacking them at this time. See *infra*, pp. 15-19.

[8] Section 10(a), 29 U.S.C. Section 160(a), as those terms are defined by Section 2(6) and (7) of the Act, 29 U.S.C. Section 152(6) and (7).

supra ($12,000 not *de minimis*); *N.L.R.B.* v. *Aurora City Lines, Inc.*, 299 F. 2d 229, 231 (C.A. 7) ($2,000 not *de minimis*). As the cited cases indicate, the time has not yet arrived when the $3,000 amount realized from respondent's interstate operation can be considered but a trifle.

B. *The Board's assertion of jurisdiction does not constitute an abuse of its discretion*

Under settled law, when the business activities of an employer have a sufficient impact on interstate commerce to involve the statutory jurisdiction of the Board, the extent to which that jurisdiction will be exercised is a matter of administrative policy within the Board's discretion. "Providing the Board acts within its constitutional and statutory power it is not for the courts to say when that power should be exercised." *N.L.R.B.* v. *Townsend*, *supra*, 185 F. 2d at 383 (C.A. 9); Accord: *N.L.R.B.* v. *Stoller*, *supra*, 207 F. 2d at 307 (C.A. 9) and cases cited; *N.L.R.B.* v. *W. B. Jones Lumber Co.*, 245 F. 2d 388, 391 (C.A. 9). In carying out this administrative policy, the Board has established standards to determine under what conditions it will assert its jurisdiction. The function served by these self-imposed standards is to conserve the Board's resources so that it may "concentrate its energies" upon those cases having a significant impact on interstate commerce. *N.L.R.B.* v. *Jones*, *supra*, 245 F. 2d at 391; *N.L.R.B.* v. *F. M. Reeves*, 273 F. 2d 710, 711 (C.A. 10), cert. denied, 366 U.S. 914. Accordingly, respondent may not successfully argue that its unfair labor practices should

be beyond the reach of the Act simply because it has not met the Board's self-imposed standards. For, as this Court has held, "These standards could not limit the jurisdiction conferred by Congress . . . . It would not appear subversive if the Board decided the activities in extraordinary cases were such that there was a substantial effect upon commerce . . . notwithstanding [the Board's self-imposed standards were not met]." *N.L.R.B.* v. *Jones, supra*, 245 F. 2d at 391. Accord: *N.L.R.B.* v. *M. L. Townsend, supra*, 185 F. 2d at 383 (C.A. 9); *Lucas County Farm Bureau Co-operative Association* v. *N.L.R.B.*, 289 F. 2d 844, 845-846 (C.A. 6), cert. denied, 368 U.S. 823; *N.L.R.B.* v. *Parran*, 237 F. 2d 373, 375 (C.A. 4); *N.L.R.B.* v. *Pease Oil Co.*, 279 F. 2d 135, 137 (C.A. 2).

In any event, respondent's operations clearly meet the Board's self-limiting standards. Thus, the Board has concluded that "it will best effectuate the purposes of the Act if jurisdiction is asserted over all non-retail enterprises which have an [*indirect*] *outflow across State lines of at least $50,000* . . . . For the purposes of applying this standard, . . . *indirect outflow* refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard." *Siemons Mailing Service*, 122 NLRB 81, 85. And see, *N.L.R.B.* v. *Hod Carriers', etc., Local No. 652, AFL-CIO*, 351 F. 2d 151, 153-154 (C.A. 9). As shown above, respondent annually receives over $3,000 directly from customers in Clarkston, Washington and receives over $7,200 annually from cus-

tomers in Lewiston who individually meet the Board's jurisdictional standards. In addition, respondent annually receives about $45,000 from the City of Lewiston which makes annual purchases of goods and materials worth at least $50,000 directly from outside Idaho. Although the city itself is exempt from the Board's jurisdiction, the Board relied on the dollar value of the services rendered by respondent to the city in determining that respondent meets the Board's jurisdictional standards.

The Board's conclusion that respondent meets its jurisdictional standards, on the basis, *inter alia*, of the services furnished the city, accords with Board policy expressed in *Siemons Mailing Service*, *supra*, where the Board stated (122 N.L.R.B. at 85, n. 12):

> We will also continue our past practice of treating sales of goods or services to enterprises or organizations which are themselves exempted from the Board's jurisdiction as indirect outflow, where such enterprises' or organizations' operations are of the magnitude necessary for the assertion of jurisdiction over comparable nonexempt organizations. See, for example, *G. C. McBride Company* 110 NLRB 1255; *Madison County Construction Co.*, 115 NLRB 701; *J. Tom Moore & Sons, Inc.*, 119 NLRB 1663.

The Board's application of this policy in the instant case is clearly within its administrative discretion, notwithstanding the fact that respondent's operations, as the Trial Examiner noted, are essentially local in character. For, as the Supreme Court said in discussing an analogous problem arising under the Sher-

man Act: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464. Accord: *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 116, 119; *Wickard* v. *Filburn*, 317 U.S. 111, 125. And see, *Shore* v. *Bldg. Trades Council*, 173 F. 2d 678, 680-681 (C.A. 3). The rationale behind this doctrine is clearly illustrated by the present case: A labor dispute among respondent's employees might well lead to a work stoppage which could [9] seriously interfere with the activities of respondent's customers, many of which do substantial amounts of interstate business and one of which is a city government responsible for the health and well-being of 20,000 inhabitants. A work stoppage by respondent's employees could, for example, impair efficiency and impede production of local businesses engaged in interstate commerce. The health hazard created by a cessation of rubbish collection in the city obviously could interfere with the activities of these businesses and the well being of their employees. Furthermore, a stoppage could force the city government to divert funds from other programs for emergency rubbish removal and as a consequence curtail purchases of interstate goods. For these various reasons, it is manifest that the Board's assertion

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[9] It is well settled that the Act does not require that an *actual* effect on interstate commerce be shown; a *presumed effect* is sufficient. *N.L.R.B.* v. *Bradford Dyeing Ass'n.*, 310 U.S. 318, 326; *N.L.R.B.* v. *Register Publishing Co.*, 141 F. 2d 156, 162-163 (C.A. 9).

of jurisdiction over respondent's activities was reasonable and proper.[10]

II. Respondent Failed to Except to the Trial Examiner's Findings That It Had Committed Unfair Labor Practices in Violation of the Act. Accordingly, the Board Properly Adopted These Findings of the Examiner *Pro Forma*

Under Section 10(e) of the Act,

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or

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[10] By overruling the Trial Examiner's recommendation that jurisdiction not be asserted over respondent, the Board indicated its disagreement with the conclusions he drew (R. 23-24) from various prior Board cases in which jurisdiction was found with respect to employers doing business with enterprises not themselves covered by the Act. That the Examiner's rationale for not asserting jurisdiction does not accord with Board policy is reflected if nothing else in his dismissing as inapposite the three cases (*G. C. McBride Company, supra; Madison County Construction Co., supra; J. Tom Moore & Sons., Inc., supra*) which the Board expressly relied on in *Siemons Mailing Service, supra,* where the controlling policy on this issue was set forth. Thus, the legal significance of the Board's citation of those three cases in *Siemons Mailing* lies in the fact that each of the cases involved employers doing business with enterprises not subject to the Board's jurisdiction. In each instance, the enterprise not covered by the Board's jurisdiction was also an instrumentality of commerce in a broad sense, in that it provided services which are essential in our economic and industrial system to the free flow of interstate commerce. Obviously, the continued operation of a municipal government and the providing of public services in a city of 20,000 population is just as important to the uninterrupted flow of commerce as any of the services or functions involved in the cases considered inapposite by the Trial Examiner.

neglect to urge such objection be excused because of extraordinary circumstances.

Pursuant to the rule-making authority vested in it by Section 6 of the Act, the Board has adopted regulations specifying the manner of bringing to its attention objections to the Trial Examiner's Decision, or any portion thereof. Under these rules, such objections must be made in the form of exceptions filed with the Board in Washington, D.C. within a specified period after service of the Trial Examiner's Decision. In the event no exceptions are filed, the Examiner's findings automatically become the findings of the Board, and "all exceptions and objections thereto shall be deemed waived for all purposes." Sections 102.46 and 102.48 (R. 29). These rules were written in effectuation of Section 10(e), and the reason for their adoption is clear. The orderly administration of the Act requires that the Board devise a means of assuring that it is apprised of all objections to the findings and conclusions made at initial stages of its proceedings, "so that the body charged with responsibility for finding the facts may discharge its duty." *N.L.R.B.* v. *Pugh and Barr, Inc.*, 194 F. 2d 217, 220 (C.A. 4). Accord: *N.L.R.B.* v. *Townsend, supra*, 185 F. 2d 378, 382-383 (C.A. 9).

The Board's rules, made to carry out the mandate of Section 10(e) of the Act, have received full judicial approval. *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374-375 (C.A. 9); *N.L.R.B.* v. *Noroian*, 193 F. 2d 172, 173 (C.A. 9); *N.L.R.B.* v. *Peyton Fritton Stores, Inc.*, 336 F. 2d 769 (C.A. 10); *Kovach* v. *N.L.R.B.*, 229 F. 2d 138, 143, 144 (C.A. 7); *Kiekhaefer Corp.* v. *N.L.R.B.*, 273 F. 2d

314, 316-317 (C.A. 7), cert. denied, 362 U.S. 950; *N.L.R.B.* v. *Ferraro's Bakery, Inc.*, No. 16585, decided Nov. 18, 1965 60 LRRM 2422 (C.A. 6); *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 310 F. 2d 565, 566 (C.A. 5), and cases cited; *N.L.R.B.* v. *Izzi*, 343 F. 2d 753 (C.A. 1). Accordingly, since respondent failed to except to the Examiner's findings that it violated the Act, it may not attack these findings before this Court. *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *Marshall Field and Company* v. *N.L.R.B.*, 318 U.S. 253, 254; *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *N.L.R.B.* v. *Giustina Bros., supra; N.L.R.B.* v. *Noroian, supra.* In short, if this Court agrees that the Board properly asserted jurisdiction over respondent, it should uphold the Examiner's unfair labor practice findings without argument on the merits. To do otherwise, it is plain, would undermine what the Supreme Court has called "the salutory policy adopted by § 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *N.L.R.B.* v. *Cheney California Lumber Co., supra*, at 48.

Nor will it avail respondent to argue that Sections 102.46 and 102.48 of the Board's Rules and Regulations are inapplicable to the case at bar, because of the fact that the Trial Examiner recommended that the Board not assert jurisdiction over respondent and that the complaint be dismissed (R. 24). As shown above (p. 6), the Trial Examiner specifically stated that the Board might decide to assert jurisdiction over respondent. In order, therefore, to "obviate a remand at some later date in the event the

Board asserts jurisdiction," he analyzed the evidence in detail and found that respondent had violated the Act in several particulars (R. 24-25). Thereafter, respondent was specifically notified that failure to take proper exception to the "findings, conclusions and recommendations" of the Trial Examiner would constitute a waiver of all objections thereto "for all purposes" and that "No matter not included" in exceptions or cross-exceptions could thereafter "be urged before the Board or in any further proceedings" (R. 29). As we have seen, respondent filed no exceptions, even though the General Counsel and the charging party filed timely exceptions to the Examiner's recommendation that the Board not assert jurisdiction over respondent. In both sets of exceptions it was pointed out that the Board's holding in *Siemons Mailing Service, supra,* clearly brought respondent within the Board's jurisdictional standards (R. 32, 35-37). In the posture of the case thus presented, respondent was directly on notice that the Board might overrule the Examiner's recommendation regarding jurisdiction and that failure to file cross-exceptions, as permitted under the Board's rules, would constitute a waiver of any objections it might have to the Examiner's adverse findings of fact and conclusions of law. The Board, receiving no objections to the Examiner's unfair labor practice findings, properly adopted these findings *pro forma.* Significantly, respondent also failed to petition the Board for reconsideration of its decision, a procedure which is provided for in Section 102.48(d) of the Board's rules and which respondent was free to follow.

Under these circumstances, respondent, having repeatedly failed to lay before the Board any objections to the adverse findings and conclusions of the Examiner, is now foreclosed from objecting thereto in this proceeding. The only alternative procedure to the one followed by the Board here, would have been for the Board to state its decision on the jurisdictional issue, open the record to further exceptions and cross-exceptions, and then make a separate decision on the merits of the unfair labor practices. Such a procedure, we submit, would compel the Board to decide a single cause through piecemeal proceedings, subject litigants to undue delay, and disrupt the orderly administration of the Act. As the Supreme Court stated in *U. S.* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37:

> Simple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[11]

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[11] Although the Court may decline to issue a decree enforcing the Board's order if it concludes that the Board has "patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388), on this record it is clear that the Board's order is well within its "ample discretion in adapting remedy to violation." *Ibid.* See also *Joy Silk Mills* v. *N.L.R.B.* 185 F. 2d 732, 741-742 (C.A.D.C.), cert. denied, 341 U.S. 914; *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702; *N.L.R.B.* v. *Howard-Cooper Corp*, 259 F. 2d 558 (C.A. 9), enforcing 117 NLRB 287, 288-289.

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be entered enforcing the Board's order in full.[12]

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National Labor Relations Board.

January 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

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[12] In the event the Court concludes that the Board properly exercised jurisdiction over respondent's business but believes that the Board should not have adopted the Trial Examiner's unfair labor practice findings *pro forma*, we submit that the matter should be remanded to the Board for consideration of respondent's conduct in light of the unfair labor practice prohibitions of the Act. See *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373-375; *Great Western Broadcasting Co.* v. *N.L.R.B.*, 310 F. 2d 591, 600 (C.A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Definitions

Sec. 2. When used in this Act—

* * * *

(6) The term "commerce" means trade, traffic, transportation, or communication among the several States, * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led to or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * *

REPRESENTATIVE AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. United States Code. Upon the filing of such petition, the

court shall cause notice thereof to be served upon such person, and thereupon, shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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